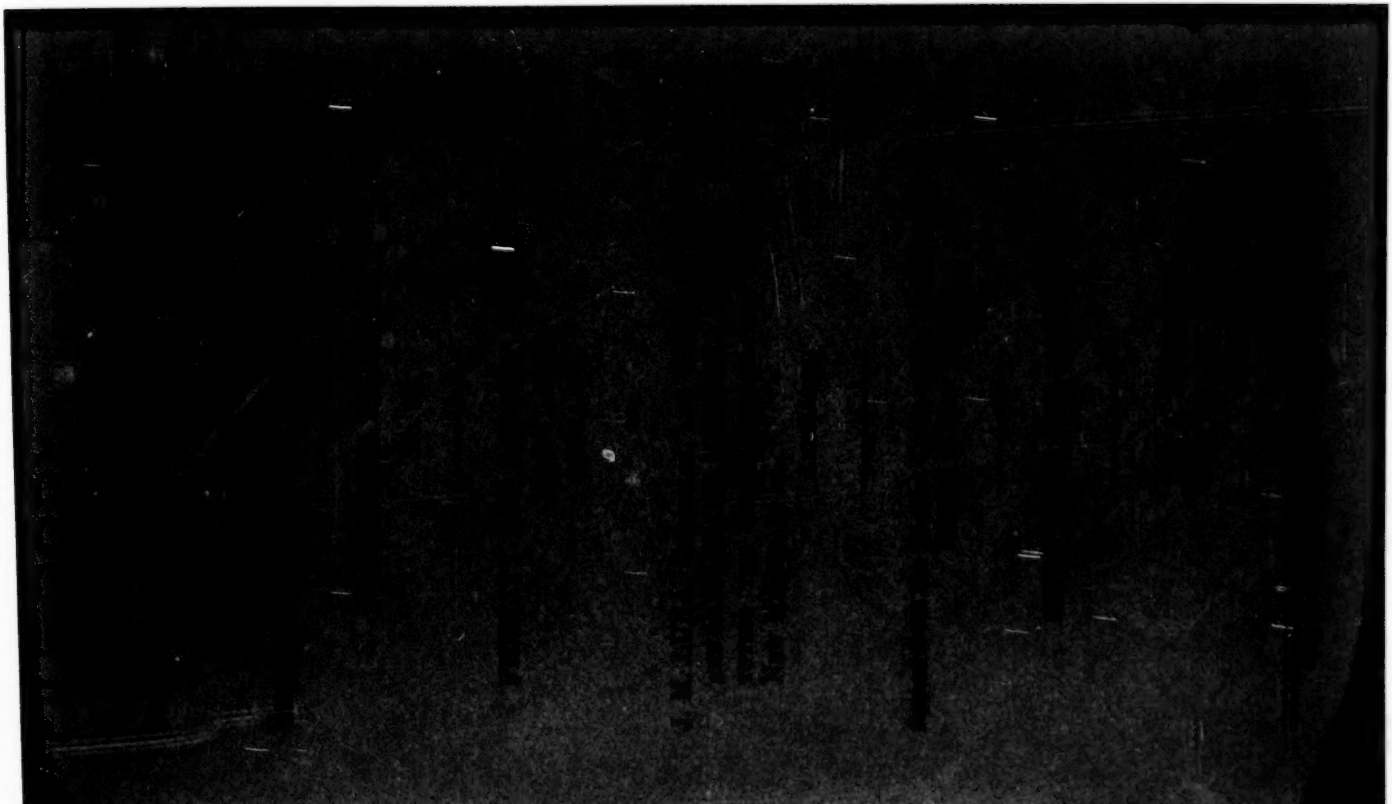

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925,

No. 88.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
APPELLANT,

vs.

J. M. LUNA, CHAIRMAN, AND HUGH H. WILLIAMS AND BONIFACIO MONTOYA, MEMBERS, CONSTITUTING THE STATE CORPORATION COMMISSION OF NEW MEXICO, ET AL.,
APPELLEES.

Appeal from the District Court of the United States for the District of New Mexico.

REPLY BRIEF FOR APPELLANT.

In view of the length of the appellant's brief as compared with the extreme brevity of the appellees', argument manifestly must not be indefinitely prolonged or repeated. This reply will be confined to (1) the surprising position taken in the appellees' brief

and (2) certain decisions not yet reported, most of them by three-judge federal courts, of course not controlling here but proper to be brought to this Court's notice.

(1) The appellees' position in their brief is at variance with their acts in the Record, and is a virtual admission that the legislation in question, as actually applied by them, is unconstitutional and that the decree must be reversed.

The appellees say (Brief, 10):

> "If the state possesses the power to insist upon a resident agent it likewise possesses the power to make sure that he be a bona fide agent and not a mere dummy or pretended agent. Probably the statutes in question do nothing more than define a bona fide resident agent, *i. e.*,—one who receives the commissions on business placed in the state. This requirement is not for the economic advantage of the agent but for the benefit of the public."

If this be the purpose of the statutes, the means are not only unconstitutional but are opposed to the end. What *is* a "dummy agent" if not one who receives commissions he does not earn? The *bona fides* of an agent is not assured by a requirement that he be paid what somebody else earns. To keep the business "in the hands of competent and trustworthy persons" resident agents, "they being immediately under the inspection of the Commissioner of Insurance," are "appropriate means." (*La Tourette vs. McMaster*, 248 U. S. 465, 468.) If the inspection of the New Mexico insurance department is inadequate, doles to "dummy agents" will not cure the inadequacy.

The appellees in the concluding paragraph of their brief (p. 12) state their position thus:

> "Appellant seeks to divide the act of placing a bond or policy into *solicitation* and *execution*, and

argues that the solicitation if done outside of the state must be paid out of the usual commission. The state recognizes no such segregation and is concerned only with the placing of the policy no matter what separate services or acts precede it. Any employee 'soliciting' New Mexico business outside the state doubtless performs valuable services for the company which the State of New Mexico has no objection to the company compensating. The entire overhead of the company including the services of the president and the efforts of the janitor of the home office likewise contribute in some measure to the placing of the policy in New Mexico. But neither the solicitor nor the president nor the janitor can claim any vested right to participate in the commission which New Mexico insists must go to the resident agent. And whenever services are performed by any outsider they are performed with notice that the resident agent who executes the policy must receive the commission and that the outsider must look to the remainder of the premium for his compensation. The State of New Mexico must insist upon a real resident agent,—a solicitor in Colorado will not do."

Appellant does not argue that anything or anybody anywhere "must be paid out of the usual commission." There is no "usual commission" in the case. "Usual commission" is not mentioned in the statutes or in the Record. Appellant is threatened with expulsion from New Mexico, not because solicitation oustide New Mexico is paid "out of the usual commission" but because *any commissions at all* are paid to agents outside New Mexico for services outside New Mexico. (Bill, pars. 6, 9, R. 4-5, 6; Answer, pars. VI, IX, R. 12. Letter from appellant to State Corporation Commission, December 13, 1923, and action of Commission, R. 22-23. Findings in final decree of District Court, R. 15.)

Section 2820 [Act of 1921] unqualifiedly prohibits payment of any "emolument of any nature" to any person not a resident of New Mexico for the obtaining of any insurance covering risks in New Mexico. This prohibition is broad enough to include the president of the company and the "janitor of the home office." This last point however is immaterial, since appellant is not actually threatened with expulsion because it pays its president and its janitor but because it pays its *agents* outside New Mexico. (Bill, par. 9, R. 6.)

Section 68 [Act of 1925] requires that "the full commission" be retained by a New Mexico agent. Both the context, (*e. g.*, the provisos in Section 68), and the antecedent legislation, (viz., Section 2820), thereby substantially re-enacted indicate that "the full commission" means the full *actual* commission paid, whether for *writing* insurance in New Mexico or for *obtaining* it outside New Mexico.

Section 68 thus prohibits payment of *any commission at all* to a non-resident agent for services outside the state in obtaining the business. If, however, "the full commission" could be construed as meaning "the full *usual* commission" paid for both (1) *obtaining* and (2) *writing* business, then Section 68 would still operate as a *prohibition* of compensation to non-residents for *obtaining* business written in New Mexico, since such compensation could be paid only on condition that the same compensation be paid a *second* time to a New Mexico resident agent who did *not* earn it. This "is a prohibition to the extent of the payment required." (*St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346, 348. Appellant's Brief, 80-81.) If "the full commission" could be construed as meaning only "the full *usual* commission" paid for *writing* business *alone* but *not obtaining* it, then this requirement of Section 68 would be meaningless but would not be violated by

appellant. Appellant of course pays its New Mexico resident agents the "usual commission" (so far as any particular commission is "usual") for *writing* business, but not the "usual commission" for both *writing* and *obtaining* business when the business is actually *obtained* through agents outside New Mexico.

However the New Mexico legislation be construed, the appellees' *acts* are *unconstitutional*. Construed (as the appellees construed and applied it) as authorizing these acts, the *legislation* is *unconstitutional*. The legislation otherwise construed, the *acts* are *unauthorized*. In either event, the decree should be reversed and the *acts enjoined*. The appellees' construction was approved by the Court below (R. 15). Recodification of this legislation without material change in the Act of 1925, since the decision below in this case, amounts to implied legislative approval of this uniform executive (*National Lead Co. vs. United States*, 252 U. S. 140, 146) and judicial (*Hecht vs. Malley*, 265 U. S. 144, 153) construction. To escape thus construing it as unconstitutional, it would need be construed as meaningless. In the face of this uniform executive, judicial and legislative construction, this Court cannot be expected to go so far in quest of a new and strained construction to save constitutionality.

(2) Recent unreported cases.

On the authority of at least four cases (three comparatively recent) in this Court the statement is made in appellant's original brief (pp. 47, 95-96, 109) that a state can no more prohibit a foreign corporation authorized to do business in the state, than it can prohibit an individual resident of the state, from making a contract outside the state. (*N. Y. Life Ins. Co. vs. Head*, 234 U. S. 149; *N. Y. Life Ins. Co. vs. Dodge*,

246 U. S. 357; *St. Louis Compress Co. vs. Arkansas*, 260 U. S. 346; all applying the principle of *Allgeyer vs. Louisiana*, 165 U. S. 578; see also *Aetna Life Insurance Co. vs. Dunken*, 266 U. S. 389; opinions quoted at length, Appellant's Brief, 60-70.) Accordingly Resident Agent Laws, in so far as they prohibit *contracts of insurance made outside* the state *on risks within* the state, are unconstitutional—so clearly so that state officials (including those of New Mexico, the appellees in this case) no longer attempt to enforce such statutes as so applied. Not so—it now appears—in Ohio.

(*a*) Without referring to any of these cases or citing any authority whatever the federal court for southern Ohio (CIRCUIT JUDGE DONAHUE and DISTRICT JUDGES WESTENHAVER and HOUGH) in *Palmetto Fire Insurance Co. vs. Conn, Superintendent of Insurance*, (decided October 20, 1925), held the contrary. The Palmetto Company made an "open contract of insurance" with the Chrysler Company to cover all Chrysler automobiles when sold by dealers to ultimate purchasers, including cars so sold and owned in Ohio. The contract of insurance (as the insurance company claimed and the court apparently assumed) was a Michigan contract, lawfully made in Detroit. The insurance company was authorized to do business in Ohio. The court held that the Ohio Resident Agent Law (1) prohibits an insurance company authorized to do business in Ohio from making in Michigan a contract of insurance on risks in Ohio and (2) is a valid provision with which an insurance company must comply in order to do business in Ohio. Accordingly the Court dismissed the bill for injunction to prevent the insurance commissioner from revoking plaintiff's license. ***An appeal to this Court has already been entered.***

The court, not denying that the contract of insurance was a Michigan contract, said:

> "However that may be, the transaction comes wholly within the provision of Section 5438 General Code of Ohio, which prohibits an insurance company legally authorized to transact business in Ohio, from writing, placing or causing to be written or placed, insurance upon property situated or located in this state, except through a legally authorized agent in this state, who shall countersign all policies so issued and enter the payment of the premium upon his record.
>
> "While this Section is in furtherance of the state's taxing policy, it is nevertheless a valid provision with which the plaintiff must comply in order to do business in Ohio. * * *
>
> "This of course does not affect the question of the right of a citizen of Ohio to buy insurance where he pleases or from whom he pleases, nor does it affect the right of a foreign insurance company to sell to a citizen of Ohio a Michigan contract of insurance, but on the other hand, it does prevent an insurance company who has been admitted to do an insurance business in Ohio, from issuing policies upon property in Ohio upon any other terms or conditions than as named in the statute. In other words, it may not accept the benefits of the right and privilege of doing an insurance business in Ohio, and reject the conditions imposed by the statute."
>
> [Opinion printed in full as Appendix C of this brief, *infra* 14-19.]

This reasoning is simply the exploded doctrine of the *Doyle* [94 U. S. 535] and *Prewitt* [202 U. S. 246] cases, (overruled by the long line of cases from *Western Union Tel. Co. vs. Kansas*, 216 U. S. 1, to *Terral vs. Burke Construction Co.*, 257 U. S. 529), that *any* regulation at all, however *unconstitutional*, becomes valid as a *condition* of a foreign corporation's right to do business. Without repeating the argument and

review of authorities against this exploded doctrine (Appellant's Brief, 27-45) it will suffice to repeat only the reply of this Court to similar reasoning in a similar effort to escape the general rule of the *Allgeyer* case [165 U. S. 578] under the guise of conditions imposed on foreign corporations. This Court, by CHIEF JUSTICE WHITE, said:

> "But when this reasoning is analyzed we think it affords no ground whatever for taking this case out of the general rule and making the distinction relied upon. This is so as the proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority. A distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States. It is apparent therefore that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the Constitution are ephemeral and depend simply upon the willingness of any of the States to exact as a condtion of a license granted to a foreign corporation to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing. It would go further than this, since it would require it to be decided not only that the constitutional limitations on state powers could be set aside as the result of a license but that the granting of such license could be made the means of extending state power so as to cause it to embrace subjects wholly beyond its legitimate authority."
>
> *N. Y. Life Ins. Co. vs. Head*, 234 U. S. 149, 163-164.

(*b*) More recently the federal court for southern New York (CIRCUIT JUDGE ROGERS and DISTRICT JUDGES AUGUSTUS HAND and KNOX) in *Palmetto Fire Insurance Company vs. Beha, Superintendent of Insurance*, (decided November 10, 1925), restrained by injunction the revocation of the insurance company's New York license on account of the making of the same Michigan contract of insurance with the Chrysler Company. The New York statute authorizes such revocation "whenever in the judgment of the superintendent of insurance it will best promote the interests of the people of this state." The court, in its opinion by JUDGE ROGERS, distinguishes the *Conn* case on the obvious ground that New York, unlike Ohio, has no Resident Agent Law. This made it unnecessary *in terms* to approve or disapprove the opinion in the *Conn* case. In effect, however, JUDGE ROGERS' careful opinion, with full citation of authorities, state as well as federal, is in accord with the decisions of this Court and in conflict with the *Conn* case. After quoting and distinguishing the *Conn* case JUDGE ROGERS says:

> "The State of New York cannot by its statutes control or impair transactions which are extraterritorial. In *Allgeyer vs. Louisiana*, 165 U. S. 578, the Supreme Court had before it a statute enacted by the Legislature of Louisiana which subjected to fine any person or firm who should fill out, sign or issue in the State of Louisiana any certificate of insurance under an open marine policy, or who in any matter whatsoever should do any act in the state to effect for himself or for another, insurance on property then in the state, in any marine insurance company which had not complied with the laws of the State. The Court held the statute unconstitutional.
>
> A policy is not invalid which is issued in the State of Michigan to a citizen of New York upon property in the latter State. See *Baker vs. Spauld-*

ing, 71 Vt. 169; *Pennypacker vs. Capital Insurance Company*, 80 Iowa 86; *Phoenix Insurance Co. vs. Pennsylvania Ins. Co.*, 134 Ind. 215; *Strampe vs. Farmers Mutual Insurance Co.*, 109 Minn. 364; *Clay Fire and Marine Ins. Co. vs. Huron Salt and Lumber Mfg. Co.*, 31 Mich. 346; *Columbia Fire Ins. Co. vs. Kinyon*, 37 N. J. L. 33, 36.

A resident in New York solicited by letter addressed to a Massachusetts corporaton in that State and not authorized to do business in New York, a policy of insurance on property in New York. The Massachusetts company accepted the proposal and mailed the policy. The New York Court of Appeals said of this transaction: This resulted not in the transaction of business in New York but in the consummation in Massachusetts of a contract which was lawful in New York. *Huntington vs. Sheehan*, 206 N. Y. 486, 489. And see *Stone vs. Penn Yan, K. P. & B. Ry.*, 197 N. Y. 279.

And the New York Courts have said that the Legislature has no power to prohibit a resident of New York entering into a contract with a corporation of another State having a right to do business therein, as a law of one State which interferes with the constitutional right of an insurance company of another State to make them would be void or to that extent unconstitutional. *Hammond vs. International Insurance Co.*, 116 N. Y. Supp. 854, aff'd 119 N. Y. Supp. 1127, 134 App. Div. 995."

* * * * * *

"We are satisfied that while a State, for reasons satisfactory to itself, may exclude from its boundaries a foreign corporation not engaged in interstate or foreign commerce, if it licenses it to do business within its territories it cannot thereafter revoke the license because it does business in some other State in a manner consistent with its laws and makes contracts there with residents of the objecting State—the laws of which have not restricted such residents' freedom of contract." [A proposition equally sound without the added dozen words.]

"It has been held that a State has the right to exclude any foreign corporation not engaged in interstate or foreign commerce and can impose such conditions and limitations upon its right to do business within the State as it sees fit. *Opinion of Justices, In re*, 97 Me. 590..

And in *Doyle vs. Continental Insurance Co.*, 94 U. S. 535, 541, the Court said:

'A license to a foreign corporation to enter a State does not involve a permanent right to remain * * *. Full power and control over its territories, its citizens, and its business, belong to the State.

If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. * * *

If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world.'

In the *Doyle* case the Court reaffirmed *Insurance Company vs. Morse*, 20 Wall. 445, and held that a State law was not unconstitutional which revoked a license to a foreign corporation to do business within the State because while doing only a domestic business in the State it resorted to the federal court sitting in the State. But the *Morse* case and the *Doyle* case in so holding have been overruled and the law is now established in accordance with the views of the minority Judges in those cases. *Terral vs. Burke Construction Co.*, 257 U. S. 529, 533." [This reference to the *Morse* case as overruled is an inadvertence. The *Prewitt* case (202 U. S. 246), not the *Morse* case, was overruled.]

[Opinion printed in full as Appendix D to this brief, *infra* 20-42.]

(*c*) Still more recently the federal court for western Wisconsin (CIRCUIT JUDGE EVANS and DISTRICT JUDGES GEIGER and LUSE) in *Chrysler Sales Corporation vs. Smith, Commissioner of Insurance,* (decided November 20, 1925, opinion by JUDGE LUSE), considered the same Chrysler insurance contract. The Palmetto Fire Insurance Company is *not* authorized to do business in Wisconsin. In the *Smith* case the court held (disagreeing with the opinions in *both* the *Conn* and the *Beha* cases), (1) that the Chrysler dealers who sell cars in Wisconsin thereby act as *agents of the insurance company,* and, therefore, (2) as to cars sold in Wisconsin the Chrysler insurance contract is not a Michigan contract but a Wisconsin contract. From these premises it necessarily followed that the operation of the Chrysler insurance contract violates the laws of Wisconsin. Whether these premises are sound is a complex question of law and fact which is *not* material *in the present case.*

(*d*) The case of *Scott, Commissioner of Insurance, vs. Smelker,* was argued in the Texas Court of Civil Appeals for the Third District on October 28, 1925, but has not yet been decided. In that case the trial court enjoined the Commissioner of Insurance from enforcing an order, addressed to all companies "writing fire and miscellaneous insurance in Texas,"—

> "That all or no part of any commission in consideration or on account of any policy or policies covering property, person or persons within the State of Texas is to be paid any non-resident agent or broker either directly or indirectly; that the practice engaged in by some companies of having a resident licensed agent in Texas, pro forma to countersign a policy for which he receives a part of the commission, the balance being paid to a non-resident agent or broker, is in violation of the law and must not be continued."

The trial court filed the following conclusions of law:

"First: It is the opinion of the Court, under the uncontradicted facts set out and agreed to in the pleadings, that no law of the State of Texas authorizes or supports the order of the defendant complained of." [The Texas insurance laws differ materially from the New Mexico resident agent legislation.]

"Second: The Court finds that if any statute or statutes of the State of Texas by any reasonable construction can be held to support the order of the defendant complained of, the said statute or statutes, in so far as they do or might furnish such support, are invalid as denying to the plaintiffs and each of them rights guaranteed to them by the Constitution of the State of Texas and by the Constitution of the United States."

Respectfully submitted,

C. J. ROBERTS,
CHARLES MARKELL,
Counsel for Appellant.

APPENDIX C.

In The

DISTRICT COURT OF THE UNITED STATES

For the Southern District of Ohio.

EASTERN DIVISION.

Palmetto Fire Insurance Company, Plaintiff, *vs.* Harry L. Conn, Superintendent of Insurance for the State of Ohio, Defendant.	}	No. 384 In Equity.

Per Curiam.

The Palmetto Fire Insurance Company is an insurance corporation, organized and existing under the laws of the State of South Carolina. The defendant, Harry L. Conn, is the duly appointed, qualified, and acting superintendent of Insurance of the State of Ohio, and a citizen and resident of the State of Ohio.

It is averred in the petition that the matter in controversy exceeds, exclusive of interests and costs, the sum or value of $3,000.00.

In 1924 the plaintiff applied for admission to the State of Ohio and for the right to do the business of re-insurance in the state, and was granted such right and duly licensed by the Superintendent of Insurance

of Ohio. The plaintiff brings this action to enjoin the defendant, as Insurance Commissioner of Ohio, from revoking the license of the plaintiff to do an insurance business in Ohio and also from in any wise interfering with the operation and carrying out of a certain contract between the plaintiff and the Chrysler Sales Corporation,—a corporation organized and existing under the laws of the State of Michigan.

Before the day set for the hearing of the motion for a temporary injunction by the Court as now constituted, the defendant filed his answer, and by consent of counsel this cause was finally submitted, upon its merits.

It further appears from the bill of complaint, that on the 16th day of June, 1925, complainant, who was then duly authorized to do business in the State of Michigan, entered into what is called an "open contract of Insurance" with the Chrysler company, which was later modified by a rider attached thereto, and in which it was expressly provided that the rider should supersede and take the place of anything to the contrary in the original contract; that under the terms of the original and supplemental contract, the plaintiff agreed to issue certificates of insurance to purchasers of Chrysler cars, wherever sold, the loss, if any, payable to the purchaser of such car if the purchase price had been paid in full, or, if not, then to the dealer or finance company financing the same, the excess thereof to be paid by the dealer or finance company to the owner. It further appears that this open contract of insurance does not purport to cover any particular specific property, and does not touch or cover any property until the car is actually sold by the dealer to his customer. The Chrysler Company, however, collects from its dealers in the several states whenever the car is delivered to such dealer the amount of pre-

mium contracted to be paid for such insurance, and the dealer in turn collects a like amount from the purchaser of the car as a part of the purchase price thereof. The sale is then reported and a certificate of insurance is issued to the purchaser. The Chrysler Company is required to make monthly statements of the sales made by its dealers, and remit to the plaintiff the contract amount of the premiums on all sales made in the prior month. On June 30, 1925, the defendant notified the Chrysler Company by letter that it would be required to comply with the laws of Ohio in reference to insurance, if its plan included in its contemplation Chrysler cars sold in Ohio.

On the 30th day of July, 1925, the plaintiff submitted defendant a copy of this contract and supplemental contract designated as "an open contract" or "a running policy," between the Chrysler Company and the insurance company, and thereupon the defendant notified the complainant, that in his opinion the plan was unlawful and prohibited by the statutes of Ohio, and notified counsel for plaintiff, that on Thursday, August 6, 1925, at 10 o'clock A. M., he would consider the revocation of plaintiff's Ohio license on the ground that the Company was violating the Ohio Insurance laws.

Counsel for the plaintiff did not appear at the time named, but on the contrary, on the same day and shortly before that hour, notified the Commissioner of Insurance that it intended to bring this action. The order revoking the license was then made and entered by the Commissioner, and notice forwarded to the plaintiff. On the same day and a few hours thereafter, the plaintff filed this bill of complaint, and the Court, without being advised that the order had already been made, allowed a temporary restraining order.

It is claimed that on the part of the defendant, that because the order was made after notice that the bill

was to be filed and before the bill was filed or the temporary restraining order allowed, that this Court has no jurisdiction to restrain the doing of a thing that already has been done.

With this contention we do not agree. Hasty action to anticipate litigation may be rectified by mandatory injunction and a restraining injunction may be issued to prevent the Commissioner from carrying this order of revocation into effect.

St. Louis & S. F. Ry. Co. vs. Cross, 171 F., 480, 495;

Harrison vs. St. Louis & S. F. Ry. Co., 232 U. S., 319, 332.

The Commissioner of Insurance heard no evidence and made no finding of fact, but it does appear that his action was based on the complainant's open insurance contract with the Chrysler Company which had been filed with him, and the method of doing business thereunder, as fully explained by counsel. These same facts also appear from the plaintiff's bill. It follows, therefore, that if the plaintiff's Contract and method of doing business violates any valid statute of Ohio, or any lawful regulation which the State of Ohio may enforce, it would be a useless and futile thing to grant an injunction ordering a cancellation of the order of revocation, even though hastily and informally made. Under such a state of facts the plaintiff is without equity. It is the claim of the plaintiff that notwithstanding the insurance contemplated in the open or running contract does not take effect upon any property whatever until the car is actually sold by a dealer in Ohio to his customer in Ohio, after and in pursuance such contract of purchase including car and insurance thereon is not an Ohio contract, but a Michigan contract, and is an act done in furtherance of the Michigan

contract entered into between the Chrysler Company and the insurance company. However that may be, the transaction comes wholly within the provision of Section 5438 General Code of Ohio, which prohibits an insurance company legally authorized to transact business in Ohio, from writing, placing, or causing to be written or placed, insurance upon property situated or located in this state, except through a legally authorized agent in this state, who shall countersign all policies so issued and enter the payment of the premium upon his record.

While this Section is in furtherance of the state taxing policy, it is nevertheless a valid provision with which the plaintiff must comply in order to do business in Ohio. If it were conceded that these special policies of insurance issued to the Ohio purchasers of cars, the premium on which he pays to the Ohio dealer to reimburse him for the amount he paid to the Chrysler Company when he purchased the car from Chrysler are Michigan contracts, nevertheless it is a violation of the law of Ohio, which fixes the terms and conditions upon which the plaintiff may do business in Ohio.

This of course does not affect the question of the right of a citizen of Ohio to buy insurance where he pleases and from whom he pleases, nor does it affect the right of a foreign insurance company to sell to a citizen of Ohio a Michigan contract of insurance, but on the other hand, it does prevent an insurance company who has been admitted to do an insurance business in Ohio, from issuing policies upon property in Ohio upon any other terms or conditions than as named in the statute. In other words, it may not accept the benefits of the right and privilege of doing an insurance business in Ohio, and reject the conditions imposed by the statute.

Chrysler retail car dealers are not insurance agents nor are they qualified or have they attempted to qualify as such under the insurance laws of the State.

The application for an interlocutory injunction and the prayer for permanent injunction will therefore be denied and the case dismissed at the cost of the Complainant.

MAURICE H. DONAHUE,
Circuit Judge.

C. C. WESTENHAVER,
District Judge.

BENSON W. HOUGH,
District Judge.

APPENDIX D.

In The

DISTRICT COURT OF THE UNITED STATES

For the Southern District of New York.

Palmetto Fire Insurance Company,
Plaintiff,
against
James A. Beha, as Superintendent of Insurance of the State of New York,
Defendant.

Before:

Rogers, Circuit Judge, and
Hand and Knox, District Judges.

Hartwell Cabell, for Plaintiff; Milton B. Ignatius, James M. Lown, of Counsel.

Albert Ottinger, Attorney-General of the State of New York, for Defendant; Claude T. Dawes, Joseph C. H. Flynn, Deputies Attorney-General; Clarence C. Fowler, Special Deputy, of Counsel.

Rumsey & Morgan, for New York Fire Insurance Rating Organization, (As *Amicus Curiae*).

Rogers, Circuit Judge. This suit is brought to enjoin the Superintendent of Insurance of the State of

New York from revoking a license which he had granted to the Palmetto Fire Insurance Company, a South Carolina corporation, authorizing it to transact within the State of New York the business of fire insurance as provided in the Insurance Law of the State.

While this is a suit solely against the defendant Beha, and against him as Superintendent of Insurance, it appears that the Governor of the State of New York and the Attorney General as well as the Superintendent of Insurance were served with the subpoena, a copy of the bill of complaint and of the order to show cause. These officials all appeared specially and not otherwise. They filed what they call "Suggestion to the Honorable Federal Judges." In it they set forth that the suit is in fact and according to the law of the land one against the sovereign State of New York and the People thereof, and that as it was brought by a citizen of another State, it was in violation of and contrary to the Constitution of the United States and that this court therefore is without jurisdiction to entertain the suit, and without power to grant the relief which is asked.

We shall at once consider the question of jurisdiction, for if the court is without jurisdiction we can do nothing but dismiss the bill.

Prior to the Eleventh Amendment the judicial power was held to extend to a suit by a citizen of one State against another State, such suit being within the original jurisdiction of the Supreme Court. *Chisholm v. Georgia*, 2 Dallas, 419. But this led to the adoption of the Eleventh Amendment since which time the Federal judicial power does not extend to suits against a State brought by a citizen of another State. *Carolina Glass Company v. South Carolina*, 240 U. S. 305. This immunity from suit is a personal privilege and may be waived in a case otherwise within the jurisdiction

of the court. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273. In this action it not only has not been waived but is earnestly asserted.

The Eleventh Amendment reads:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State * * *."

And Section 2 of Article III provides that

> "In all cases affecting Ambassadors * * * and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

The State of New York is not a party to this proceeding. It is elementary that a State cannot be sued even in its own courts by one of its own citizens without its consent and such a suit cannot be brought in its own courts even on a cause of action arising under the Constitution and laws of the United States. *Hans v. Louisiana*, 134 U. S. 1; *North Carolina v. Temple*, 134 U. S. 22.

The prohibition of suits in the federal courts against a State without its consent does not, however, preclude an action against a State officer unless such officer is only a nominal defendant and the State is the real party in interest. *Carolina Glass Co. v. South Carolina, supra.* And it is well settled law that a suit to restrain a State officer from acting under a Statute which it is charged violates the Constitution of the United States or otherwise violates constitutional rights, is not a suit against the State and is within the federal jurisdiction. *Looney v. Crane Co.*, 245 U. S. 178; *Louisville &c. R. R. Co. v. Greene*, 244 U. S. 522; *Hopkins v. Clemson Agricultural College*, 221 U. S. 634; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S.

273; *Herndon v. Chicago &c. R. Co.*, 218 U. S. 135; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165. In *Looney v. Crane Co., supra*, which was a suit to enjoin the Attorney General of Texas from enforcing an unconstitutional tax it was contended that the United States District Court in Texas was without jurisdiction on the ground that it was in substance a suit against the State. The Supreme Court, speaking through CHIEF JUSTICE WHITE, thus disposed of the contention:

> "There is a contention to which we have hitherto postponed referring, that the court below was without jurisdiction because the suit against the State officers to enjoin them from enforcing the statutes in the discharge of duties resting upon them was in substance and effect a suit against the State within the meaning of the Eleventh Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities. *Ex parte Young*, 209 U. S. 123; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278."

The suggestion that the court is without jurisdiction to hear and determine this case must be dismissed as without merit.

The Palmetto Fire Insurance Company, a corporation created under the laws of the State of South Carolina, has its principal place of business in Sumter in that State. Its capital stock at the time it was incorporated in 1912 was $25,000 but it has since been gradually increased until now it is fixed at $400,000. Its charter did not in terms expressly authorize insurance against theft. The record contains the affidavits of its president, and its vice-president, the latter being also one of the attorneys of the Palmetto Company. From those it appears that the officers honestly be-

lieved that its charter was broad enough to cover the writing of theft insurance. Subsequently the question was raised whether after all there was power to write such insurance and the charter was amended as of August 1, 1925, which authorized it to write theft insurance as well as fire insurance.

The Chrysler Corporation, which seems to be a Michigan corporation with its principal place of business in Detroit, manufactures the Chrysler cars.

The Chrysler Sales Corporation is a corporation created under the laws of the State of Michigan with its main office in the City of Detroit. It purchases the entire output of the Chrysler Corporation and markets the same. The Sales Corporation, having a certain list price upon each type of Chrysler car, sells the cars for cash to distributors throughout the country on the basis of the list price less a given discount, plus the war tax and plus certain delivery charges. The distributor likewise sells to the dealer on the basis of the list price less a smaller discount, plus the war tax and delivery charges.

The Chrysler Sales Corporation insures all Chrysler cars sold by it against loss by fire, transportation, and theft. This it does under an agreement with the Palmetto Fire Insurance Company, whereby every car manufactured and sold by the Chrysler Sales Corporation is immediately and automatically insured in Detroit in a regular automobile policy issued by the Palmetto Company. The policy assures the Chrysler Sales Corporation "and/or for account of whom it may concern." It becomes effective only when a car is sold to a retail purchaser.

The Palmetto Company on receipt at its Detroit office of an information blank filled in by the Chrysler Sales Corporation giving the purchaser's name, residence, car number, name of the finance concern, if any,

issues to each purchaser a certificate showing the car was insured under what is known as Master Policy 9562, and the insurance on the said car then applies for account of the purchaser and the holder of the sales contract named in the certificate.

The premium on each car is paid in Detroit by the Chrysler Sales Corporation, and that corporation receives no commission from anyone or in any way therefor. And the dealer when selling a car sells it at the price fixed by the Sales Corporation, and he collects no commission on any part of the insurance carrying charge. In selling Chrysler cars no deviation from the price to be charged can be made because no insurance is desired by the purchaser. If the purchaser desires insurance from some other insurance company he is at liberty to procure it.

The Commercial Credit Company is a corporation organized under the laws of the State of Delaware with its principal office in Baltimore, Maryland. It is disclosed that there is a Commercial Credit Corporation at New York City, a Commercial Credit Trust at Chicago and a Commercial Credit Co., Inc., at New Orleans. These all appear to be affiliated companies and they may operate in financing the retail sale or lease of Chrysler cars. This means that they purchase or loan upon, or otherwise acquire the notes or securities given to dealers in connection with the purchase or lease of Chrysler cars at retail.

The insurance is effected by an open policy running from the Palmetto Fire Insurance Company to the Chrysler Sales Corporation. The policy is executed in Detroit, where the principal office of the Sales Corporation is located and where the Insurance Company maintains a general agency. It insures all Chrysler six cylinder, four cylinder and commercial cars which may be sold during the policy year, beginning July 1,

1925. The policy covers the full retail purchase price for the term of one year from the date of the sale to the purchaser. By the terms of the policy the Sales Corporation is entitled to a certificate in its name for the account of whom it may concern whenever a car is reported to it as having been sold at retail. The certificate names the purchaser and is sent to him, and in counterparts to others who have an equity in the car, such as finance companies, and banking concerns discounting purchase money notes.

The contract existing between the Palmetto Company and the Chrysler Sales Corporation under which the Insurance Company issues certificates of insurance upon Chrysler cars is the important, but not the sole, ground for the threatened revocation of the license heretofore granted authorizing the Palmetto Company to do business in the State of New York. In carrying out that contract the Superintendent of Insurance of the State of New York claims that the Palmetto Company is violating the laws and public policy of New York. Whether this claim is justified is the question we must determine.

The power of a State to regulate business which is affected with a public interest when transacted within its borders, whether by a domestic or a foreign corporation, is not open to question.

That the business of interstate insurance is not interstate commerce, and as such is not beyond State regulation, has long been settled. *Paul v. Virginia*, 8 Wall. 168.

But the business is quasi public in character, and within the right of the State to determine who may engage in it within its boundaries, and upon what terms and conditions the business is to be conducted. It may regulate the business and all persons engaged in it. In *German Alliance Insurance Co. v. Kansas*,

233 U. S. 389, 405, it was argued that the business of fire insurance is a private business and that there is no constitutional power in a State to fix rates and charges for services rendered by it. The argument was set aside as unsound, and in a carefully considered and extended opinion by Mr. JUSTICE MCKENNA the court sustained the constitutionality of the Kansas Statute regulating fire insurance rates. In the statutes of every State in the Union superintendence and control over the business of insurance are exercised. "Those regulations," said the Court in the Kansas case, "exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation."

The State has power either wholly to exclude a foreign insurance company from doing business within its limits, or to impose on it such terms and conditions as it deems proper as a condition precedent to its right to do business within its limits. *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489; *Carrol v. Greenwich Ins. Co.*, 199 U. S. 401; *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602.

The State cannot forbid contracts of insurance relating to risks within its limits from being made between a citizen and a corporation in another State. *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 397; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357, 373; *New York Life Insurance Co. v. Head*, 234 U. S. 149; *Allgeyer v. Louisiana*, 165 U. S. 578; *Nutting v. Massachusetts*, 183 U. S. 553, 557; *Delamater v. South Dakota*, 205 U. S. 93, 102; *Provident Savings Association v. Kentucky*, 239 U. S. 103, 114; *Adams v. Tanner*, 244 U. S. 590, 595. An attempt of that kind would be an unlawful invasion of the citizen's liberty of contract under the Fourteenth Amendment.

The Palmetto Fire Insurance Company, being a South Carolina corporation, in 1918 applied for a license to do business in the State of New York, and on December 6th of that year such license was issued to it by the Superintendent of Insurance. It recited that the Company had "complied with all the requirements of law," and that it was "authorized to transact within this State the business of Fire Insurance as provided by Article III of the Insurance Law, until April 30, 1919." This license was renewed up to and including April 30, 1923. About that time it gave notice to the Superintendent of Insurance that it intended to retire from the State of New York. But on December 9, 1924, it again applied to the Superintendent of Insurance, and a license was granted to it on December 20, 1924, which again recited that the Company had "complied with all the requirements of law." On May 1, 1925, the Superintendent of Insurance again granted to the Company a license to transact within the State of New York the business of Fire Insurance until May 1, 1926. That license is still in full force and effect.

The New York Statute gives to the Superintendent of Insurance the power to revoke a license issued to a foreign corporation authorizing it to do business in the State. It provides as follows:

> "Whenever in the judgment of the superintendent of insurance it will best promote the interests of the people of this state, he may, after a hearing on notice, revoke the certificate of authority of a foreign corporation to do business in this state, prior to its expiration under this section. The action of the superintendent of insurance in revoking the certificate of authority of a foreign corporation shall be subject to review by writ of certiorari."

A license is merely a permit or privilege to do what otherwise would be unlawful. The purpose of it is to regulate and control the manner in which the business is conducted and prevent its being carried on in such a way as to injure public interests. And it may be issued for both regulation and revenue. A license is a mere privilege and is not a contract. *Metropolitan Excise Board v. Barrie*, 34 N. Y. 657; *Burgess v. Brocton*, 235 Mass. 95; *Balling v. Elizabeth Excise Board*, 79 N. J. L. 197. It is not a property right. *Jones v. Motley*, 78 Ala. 370; *Voight v. Newark Excise Board*, 59 N. J. L. 358; *Public Service Commission v. Booth*, 170 App. Div. (N. Y.) 590; affirmed in 155 N. Y. S. 568. And it has been held not to create a vested right. *Laing v. Americus*, 86 Ga. 756; *State v. Cote*, 122 Me. 450; *Newson v. Galveston*, 76 Tex. 559; *Littleton v. Burgess*, 14 Wyoming, 173. It appears that the license herein involved authorized the Palmetto Fire Insurance Company to transact business in the State of New York "as provided by" the Insurance Law of New York, and as that law expressly provided that the license might be revoked by the Superintendent of Insurance prior to the expiration of the time for which it was issued, the Fire Insurance Company took its license upon that understanding. But if power of revocation had not been expressly reserved we think it nevertheless might have been subject to revocation for cause.

The revocation of the license, however, cannot be made arbitrarily even though the revoking authority is by the Statute given a discretionary power. It must be for cause shown. *Klafter v. State Board of Examiners*, 259 Ill. 1.

But the question which we must decide is not, however, whether the contracts made in Michigan are valid contracts of insurance. Neither is it whether the State

of New York can deprive citizens of that State of the right to enter into contracts of insurance in some other State upon property situated in the State of New York. This it has not attempted by Statute to do. We are not now concerned with the validity of the contract made between the Palmetto Fire Insurance Company and the Chrysler Sales Corporation or the contract between the latter and the Commercial Credit Company. For the purposes of this case we may assume that those contracts are valid. What we must determine is whether this court, at this time, has the right to restrain the Superintendent of Insurance of the State of New York and thereby prevent him from revoking the license heretofore granted to the Palmetto Fire Insurance Company, a foreign corporation, and which authorizes it to do business in the State of New York.

It is alleged in the "Suggestion" submitted to the Court by the State of New York that the Palmetto Company, in making application for, accepting and retaining the licenses issued by the State, represented that if granted the privilege of doing business in the State it would conduct its business in accordance with the laws of New York and that all of its transactions within the State would be lawful. It is further alleged that having obtained its license it thereafter in violation of the laws of the State "and for the purpose of cheating and defrauding the State of New York and the People thereof out of taxes and revenues on business transacted in the State of New York, entered into a plan of concerted action with the Chrysler Sales Corporation and others by which it agreed to issue insurance contracts to citizens of New York on all Chrysler automobiles sold in the State of New York under an instrument in writing in form and appearance being its standard form of policy, but being in

fact an instrument in writing made as part and parcel of said plan of concerted action to conceal and hide from the State of New York and the People thereof and the citizens to whom it agreed to issue its certificates under said plan, the amounts received for premiums, and by so doing cheating and defrauding the State of New York and the People thereof out of taxes and revenues on whatever sums for premiums might be collected from citizens of this State under said plan."

Then it goes on to say that by entering into the plan above mentioned the Insurance Company has violated its charter and the laws of New York, and in attempting to carry out the said plan has destroyed completely its integrity with the State of New York and the People thereof, and on that account it is desired to hold the hearing provided for in the State's insurance statutes to determine "whether or not in the judgment of the Superintendent of Insurance it will best promote the interests of the People of the State of New York to revoke the certificate of authority of the Palmetto Fire Insurance Company."

In *Allgeyer v. Louisiana*, 165 U. S. 578, 583, Mr. Justice Peckham, writing for the court, said:

> "There is no doubt of the power of the State to prohibit foreign insurance companies from doing business within its limits. The State can impose such conditions as it pleases upon *the doing of any business by those companies within its borders*, and unless the conditions be complied with the prohibition may be absolute."

And in *Hooper v. California*, 155 U. S. 648, 655, Mr. Justice White said:

> "The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine busi-

> ness. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

Here again it was said that the State has power to enact and enforce all legislation in regard to things done within the territory of the State.

Have the things herein complained of been done within the State of New York by the Palmetto Fire Insurance Company so that the authorities of that State have the right to take cognizance thereof? If the Palmetto Fire Insurance Company, in the transaction of its business within the State of New York, does not violate the laws of New York can its license to do business within the State be revoked because of the manner in which it conducts its business in some third state in which its business is validly conducted? That, it seems to us, is the question presented in this case.

At the argument our attention was called to *Palmetto Fire Insurance Company v. Harry L. Conn*, decided by the United States District Court for the Southern District of Ohio, Eastern Division, and not yet reported. The defendant in that case was the Superintendent of Insurance for the State of Ohio. In that case, as in this, the Palmetto Company sought an injunction to restrain the revocation of a license. The Superintendent of Insurance had licensed the Palmetto Company to do business in that State which license he intended to revoke, and on the same day the suit was brought did revoke, on the ground that the Palmetto Company in issuing certificates of insurance in Michingan under its contract with the Chrysler Sales Corporation, in so far as such certificates applied to Chrysler cars sold in Ohio, violated the insurance laws of that State. It was contended by the plaintiff that the certificate was issued, not under an Ohio contract, but under a Michigan contract validly made between the Chrysler Sales Corporation and the Palmetto Company. The court, while it did not deny that the contract was a Michigan contract, said:

> "However that may be, the transaction comes wholly within the provision of Section 5438 General Code of Ohio, which prohibits an insurance company legally authorized to transact business in Ohio, from writing, placing or causing to be written or placed, insurance upon property situated or located in this State, except through a legally authorized agent in this State, who shall countersign all policies so issued and enter the payment of the premium upon his record.
>
> "While this section is in furtherance of the State's taxing policy, it is nevertheless a valid provision with which the plaintiff must comply in order to do business in Ohio.
>
> "* * * This of course does not affect the question of the right of a citizen of Ohio to buy insurance where he pleases or from whom he pleases,

> nor does it affect the right of a foreign insurance company to sell to a citizen of Ohio a Michigan contract of insurance, but, on the other hand, it does prevent an insurance company who has been admitted to do an insurance business in Ohio, from issuing policies upon property in Ohio upon any other terms or conditions than as named in the Statute."

If the Insurance Laws of New York contained a similar provision to that above cited prohibiting any insurance company authorized to do business in this State from insuring property within this State except through a legally authorized agent in the State, the *Conn* case would be an authority to support the defendant's contention that the relief sought should be denied. But our attention has not been called to such a provision in the New York law. The contention here seems to be that the Palmetto Company in entering into a valid contract in Michigan with the Chrysler Sales Corporation has in some way violated the laws and public policy of the State of New York "and for the purpose of cheating and defrauding the State of New York and the People thereof out of taxes and revenues on business transacted in the State of New York entered into a plan of concerted action with the Chrysler Sales Corporation and others by which it agreed to issue insurance contracts to citizens of New York on all Chrysler automobiles sold in the State of New York under an instrument in writing in form and appearance being its standard form of policy, but being in fact an instrument in writing made as part and parcel of said plan of concerted action to conceal and hide from the State of New York and the People thereof and the citizens to whom it agreed to issue its certificates under said plan, the amounts received for premiums, and by so doing cheating and defrauding

the State of New York and the People thereof out of taxes and revenues on whatever sums for premiums might be collected from citizens of this State under said plan."

At the time the Palmetto Company sought and obtained its license to do business in the State of New York it undoubtedly became bound to transact its business in that State according to the laws of New York. In making the contract it did with the Chrysler Sales Corporation in Michigan and in acting under it, it was not doing business in New York. The general rule is that a foreign corporation is not doing business in a State by entering into contracts with residents thereof, where the contracts are made and are to be performed elsewhere, although the contracts relate to property within the State. And where applications for insurance are obtained in a state by an agent of a foreign company and forwarded by him for acceptance or rejection to a company at a place outside of the State, the company is not doing business in the State wherein the applicants reside by accepting and issuing policies in pursuance thereof at such outside office. *Lamb v. Bowser*, 14 Fed. Cas. No. 8009, 7 Biss. 372; *Western v. Genesee Mutual Ins. Co.*, 12 N. Y. 258; *Stone v. Old Colony St. R. Co.*, 212 Mass. 459; *Clay Fire & Marine Ins. Co. v. Huron Salt &c. Mfg. Co.*, 31 Mich. 346; *Connecticut River Mutual Fire Insurance Co.*, 62 N. H. 622, 32 Cyc. 996.

The policy which is issued at Detroit, Michigan, under the plan insures the Chrysler Sales Corporation on cars sold together with others who may have an interest therein including the ultimate purchaser in New York, who pays no premium but can take advantage of the insurance if he chooses to avail himself of it. No renewal of the policy is allowed. It amounts to a gift of insurance for one year if the ultimate purchaser of a Chrysler car sees fit to avail himself of it.

The State of New York, if it has the constitutional right to prohibit the transaction, has not done so. As the transaction is valid in Michigan and is not invalid in New York it affords, in our opinion, no legal cause for the cancellation of the Palmetto Company's license to do business in New York.

The Superintendent of Insurance disapproves the Chrysler-Palmetto plan and regards it as in violation of the laws and public policy of the State of New York. The insurance effected under the plan is effected in Michigan and not in New York. We know of nothing in the law of New York which prohibits the owner of a Chrysler car in New York from accepting insurance upon the car effected under a Michigan contract. And the Palmetto Company in insuring in Michigan a Chrysler car owned in New York by a resident thereof is not doing business in the latter State and therefore is not as to such contracts doing business in New York and contrary to its laws.

The State of New York cannot by its statutes control or impair transactions which are extra-territorial. In *Allgeyer v. Louisiana*, 165 U. S. 578, the Supreme Court had before it a statute enacted by the Legislature of Louisiana which subjected to fine any person or firm who should fill out, sign or issue in the State of Louisiana any certificate of insurance under an open marine policy, or who in any matter whatsoever should do any act in the state to effect for himself or for another, insurance on property then in the state, in any marine insurance company which had not complied with the laws of the State. The court held the statute unconstitutional.

A policy is not invalid which is issued in the State of Michigan to a citizen of New York upon property in the latter State. See *Baker v. Spaulding*, 71 Vt. 169; *Pennypacker v. Capital Insurance Company*, 80

Iowa, 86; *Phoenix Insurance Co. v. Pennsylvania Ins. Co.*, 134 Ind. 215; *Strampe v. Farmers Mutual Insurance Co.*, 109 Minn. 364; *Clay Fire and Marine Ins. Co. v. Huron Salt and Lumber Mfg. Co.*, 31 Mich. 346; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33, 36.

A resident in New York solicited by letter addressed to a Massachusetts corporation in that State and not authorized to do business in New York, a policy of insurance on property in New York. The Massachusetts company accepted the proposal and mailed the policy. The New York Court of Appeals said of this transaction: This resulted not in the transaction of business in New York but in the consummation in Massachusetts of a contract which was lawful in New York. *Huntington v. Sheehan*, 206 N. Y. 486, 489. And see *Stone v. Penn Yan, K. P. & B. Ry.*, 197 N. Y. 279.

And the New York courts have said that the Legislature has no power to prohibit a resident of New York entering into a contract with a corporation of another State having a right to do business therein, as a law of one State which interferes with the constitutional right of an insurance company of another State to make them would be void or to that extent unconstitutional. *Hammond v. International Insurance Co.*, 116 N. Y. Supp. 854, affi'd 119 N. Y. Supp. 1127, 134 App. Div. 995.

The Superintendent of Insurance states that according to its last annual report the capital and surplus of the Palmetto Fire Insurance Company did not exceed $663,000. He states that the Company, by the Palmetto-Chrysler plan, has subjected itself and its capital and surplus to a liability greatly in excess thereof and in violation of the laws of New York which provide that such a corporation shall not expose itself on any one loss or any one risk or hazard to an amount

exceeding ten per centum of its capital and surplus. The law of New York is as he states it. But his statement that the Company has violated the New York law in the particular mentioned is unsupported by any evidence and is directly contradicted by the president of the company. In his sworn statement he flatly denies that his company has in any way impaired its capital and surplus by reason of the Palmetto-Chrysler contract. He adds that "as a matter of fact the said contract will in the opinion of deponent prove quite profitable and this is borne out by the experience so far under said contract. That while a large number of automobiles will be insured, no one risk is in excess of ten per centum of the capital of the said corporation, the maximum liability of any one car being Twenty-one Hundred and Ninety-five ($2195.00) Dollars, and the minimum on any one car being Nine Hundred and Ninety-five ($995.00) Dollars. The cars insured are owned by individual owners scattered throughout the United States; there is no conflagration hazard; that the cars are owned largely by the better class of citizens; the moral hazard is good, and no car is insured unless equipped with an approved lock device, and only insured for one year from date of purchase, without any renewal privilege."

And the vice-president of the Company in his sworn statement denies that it has impaired its capital or surplus by the Palmetto-Chrysler contract. He states that in his opinion the contract is advantageous "and will prove profitable and certainly the experience so far under said contract bears this opinion out. That no one hazard exceeds 10% of the capital and surplus of the said Palmetto Fire Insurance Company or approaches this percentage. On the contrary, automobiles covered being scattered throughout the United States, practically only one automobile at a time being

subject to any one fire or theft; that it is highly desirable business being written for only one year from the sale of said car; the car being of the better class and being purchased by the better class of citizens throughout the country the moral hazard is of the best."

We think that no justification is shown for thinking that the assets and resources of the Palmetto Fire Insurance Company are not ample and sufficient to guarantee the performance of all its obligations. It is not doubted that if an examination into its financial condition discloses its condition is such that its transaction of business in New York will be hazardous to its policy holders, or to its creditors or to the public, its license may be revoked. While there is nothing in this record which discloses that the company is in such financial condition, this court does not think it should now interfere to prevent any investigation into that subject which the Superintendent of Insurance thinks it his duty to institute.

The Superintendent of Insurance demanded that the Palmetto Company turn over to it a certain contract of June 11, 1925. Its officers state under oath that they have never had such contract and have never read it and that the contents are unknown to them. He also states that in an investigation he directed to be made into the Chrysler-Palmetto plan his examiners reported to him that the Palmetto Company refused to give information as to the premium rates on such business. But the president of the Insurance Company in a sworn statement denies that it has at any time refused to furnish the Department with any information the Department requested and which was in the power of the Company to furnish. And the vice-President of the Company in a sworn statement declares that its representatives had informed the Department that they

would furnish at any time all information it requested which was within their power to give. We do not now undertake to adjudge whether the Insurance Company is withholding information which is within its power and duty to give.

It appears that the Superintendent of Insurance complains that the Palmetto Company has written policies of insurance against theft under a charter which did not give it such authority. If the Palmetto Company had no power under its original charter to insure against theft the State of South Carolina, which created it, has jurisdiction to call it to account. Whether under the laws of that State its courts would hold that the broad powers granted to it, in its original charter, were sufficiently broad to warrant its insurance against theft we do not know and are not called upon to decide. The officers of the Company honestly thought they could lawfully write such insurance, but as they found some doubt was entertained as to their right to do this they had the charter amended and the power expressly conferred. We do not think that the doubt as to the existence of the right of the Palmetto Company to write theft insurance under its original charter, now that the charter has been amended and the power conferred, constitutes a legal ground for the revocation at this time of the license to do business in the State of New York especially as it does not appear that it ever wrote such insurance "wilfully" in the State of New York.

We are satisfied that while a State, for reasons satisfactory to itself, may exclude from its boundaries a foreign corporation not engaged in interstate or foreign commerce, if it licenses it to do business within its territories it cannot thereafter revoke the license because it does business in some other State in a man-

ner consistent with its laws and makes contracts there with residents of the objecting State—the laws of which have not restricted such residents' freedom of contract.

It has been held that a State has the right to exclude any foreign corporation not engaged in interstate or foreign commerce and can impose such conditions and limitations upon its right to do business within the State as it sees fit. *Opinion of Justices, In re*, 97 Me. 590.

And in *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 541, the Court said:

> "A license to a foreign corporation to enter a State does not involve a permanent right to remain * * *. Full power and control over its territories, its citizens, and its business, belong to the State.
>
> "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. * * *
>
> "If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world."

In the *Doyle* case the Court reaffirmed *Insurance Company v. Morse*, 20 Wall. 445, and held that a State law was not unconstitutional which revoked a license to a foreign corporation to do business within the State because while doing only a domestic business in the State it resorted to the federal court sitting in the

State. But the *Morse* case and the *Doyle* case in so holding have been overruled and the law is now established in accordance with the views of the minority Judges in those cases. *Terral v. Burke Construction Co.*, 257 U. S. 529, 533.

Counsel may present a decree enjoining the defendant as Superintendent of Insurance of the State of New York from revoking the license issued to the Palmetto Fire Insurance Company authorizing it to do business in the State of New York, on the ground that the Chrysler-Palmetto plan and the insurance written in accordance therewith in the State of Michigan constitute a violation of the laws and public policy of the State of New York.